

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION**

**B.P.J., by her next friend and mother,
HEATHER JACKSON,**

Plaintiff,

v.

**Civil Action No. 2:21-cv-00316
Honorable Joseph R. Goodwin, Judge**

**WEST VIRGINIA STATE BOARD OF EDUCATION,
HARRISON COUNTY BOARD OF EDUCATION,
WEST VIRGINIA SECONDARY SCHOOL
ACTIVITIES COMMISSION, W. CLAYTON BURCH
in his official capacity as State Superintendent, and
DORA STUTLER in her official capacity as
Harrison County Superintendent,
Defendants,**

And

**LAINIEY ARMISTEAD,
Defendant-Intervenor.**

**MEMORANDUM IN SUPPORT OF
WEST VIRGINIA SECONDARY SCHOOL ACTIVITIES COMMISSION'S
MOTION IN LIMINE TO EXCLUDE BLATT EXHIBIT 21**

Now comes West Virginia Secondary School Activities Commission (WVSSAC), by counsel, Roberta F. Green, Kimberly M. Bandy, Shannon M. Rogers and Shuman McCuskey Slicer PLLC, and moves the Court for an order in *limine* to preclude use of the 2021 Green Book Summary of Public Education Bills Enacted During the 2021 Regular Session (hereinafter "Green Book"), which is Exhibit 21 to the deposition of Michele Blatt (2.14.22) (ECF No. 289-19). Ms. Blatt was deposed as the 30(b)(6) witness representing the West Virginia State Board of Education and State Superintendent W. Clayton Burch.¹ Over the course of her three-hour deposition,² Ms.

¹ ECF No. 289-19 at 17.

² ECF No. 289-19 at 10, 137.

Blatt provided testimony upon which the parties have relied. Clearly, the State Board relied upon Ms. Blatt's testimony in its motions practice.³ Also, Ms. Blatt confirmed that the State Board receives federal funding, a fact upon which Plaintiff relied in motions practice.⁴ Ms. Blatt confirmed that the 2.0 Rule is a State rule (that only the State may waive or otherwise change or modify), which rule is embedded as a whole into the WVSSAC regulations,⁵ a fact upon which WVSSAC relied in motions practice.⁶

Ms. Blatt testified that the State Board prepares a summary of legislation passed each legislative session, which summaries are titled the 'Green Book.'⁷ It is a publication of the State Board that also lists the name of a person alleged to be in the best position to answer questions about the legislation itself.⁸ The entry for HB 3293 lists [WVSSAC Executive Director] Bernie Dolan as the contact for HB 3293:

14 Q. And who is listed as the WVDE contact for
15 House Bill 3293? 14:28:28
16 A. It says "Bernie Dolan, West Virginia
17 Secondary Schools Activities Commission."
18 Q. And why was Bernie Dolan chosen as the
19 Department of Education contact for House Bill
20 3293? 14:28:40
21 MS. GREEN: Roberta Green on behalf of
22 SSAC.
23 Object to the form.
24 THE WITNESS: He was chosen because
25 this -- he is in charge of the SSAC and the 14:28:49
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1 regulation and oversight of those athletic events.
2 BY MS. VEROFF:
3 Q. And as the Department of Education contact
4 for House Bill 3293, he was speaking on behalf of
5 the Department of Education if someone contacted 14:29:04

³ ECF No. 283-1.

⁴ ECF No. 290 at ¶ 112.

⁵ ECF No. 289-19 at 10, 132-33.

⁶ ECF No. 277 at 3.

⁷ ECF No. 289-19 at 106.

⁸ ECF No. 289-19 at 106-07.

6 him with questions?

7 MS. MORGAN: Object to form.

8 MS. GREEN: I'm going to object to the

9 form.

10 Roberta Green, SSAC. 14:29:14

11 THE WITNESS: He would be speaking in

12 reference to what was in the statute, if contacted.⁹

In a nutshell, here, Ms. Blatt was asked to comment on documents/evidence that, on subsequent examination, she admitted were beyond her knowledge as an individual and/or as a 30(b) witness. As a result, at least one such document, Exhibit 21, the Green Book, is not authenticated for any purpose before this Court and must be excluded as hearsay. Where, finally, WVSSAC could attempt to clear up any confusion at trial relative to Mr. Dolan's name appearing in the Green Book, it is a bell that, once rung, may or may not be un-rung. Because WVSSAC had no role in the legislation¹⁰ and has not been adjudicated to be either a state actor¹¹ or Mr. Dolan a state employee,¹² the appearance of WVSSAC's Executive Director Bernie Dolan in the State Department of Education's Green Book is an outlier that even Ms. Blatt cannot explain.

⁹ ECF No. 289-19 at 108-09.

¹⁰ ECF No. 289-18 at

¹¹ ECF Nos. 277, 298, 335.

¹² ECF No. 289-19 at 109 (emphasis added):

14 Q. And is it unusual for **a non-Department of**

15 Education employee to be listed as the contact for 14:29:28

16 a bill?

17 MS. MORGAN: Object to form.

18 THE WITNESS: I would say it is not a

19 normal practice; however, the -- our lead on that

20 bill had been Sarah Stewart. By the time this book 14:29:43

21 was published, she had already left, so he was the

22 one that would be able to be most versed in the

23 statute.¹²

Where usually the authenticity of a published document is relatively straightforward,¹³ here, Ms. Blatt was unable to authenticate this precise entry in the Green Book. That is, Ms. Blatt testified that she has no knowledge as to whether Mr. Dolan had knowledge of the statute and/or whether Mr. Dolan knew that his name was being affiliated with the statute and/or listed in State publications with that statute or any other. Finally, Ms. Blatt conceded she would defer to Mr. Dolan on these topics, allowing him to address for himself his role, his knowledge relative to this statute, if any:

3 EXAMINATION

4 BY MS. GREEN:

5 Q. This is Roberta Green, here on behalf of 15:03:24

6 WVSSAC. And, Ms. Blatt, I have a few questions

7 for you. Appreciate your patience.

8 I've heard you testify to some things that

9 referenced Bernie Dolan.

10 Did you confer with Bernie Dolan today -- 15:03:37

11 or prior to your deposition today?

12 A. No.

13 Q. So in terms of who Mr. Dolan communicated

14 with relative to the legislation, would you defer

15 to Mr. Dolan identify those persons for himself? 15:03:54

16 A. Yes, I would.

17 Q. And in terms in your Deposition

18 Exhibit 21, which is the Green Book, at page 23,

19 there's a summary of House Bill 3293 that

20 represents that the West Virginia Board Department 15:04:08

21 of Education contact is Bernie Dolan.

22 Do you recollect that document?

23 A. Yes.

24 Q. And as you sit here, do you understand

25 that Bernie Dolan is not a West Virginia 15:04:18

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1 Department of Education employee?

¹³ *ATS Int'l Servs. v. Konsa Intl. CCC*, 2014 U.S. Dist. Lexis 60796 (2014):

"A party seeking to admit an exhibit need only make a prima facie showing that it is what he or she claims it to be. This is not a particularly high barrier to overcome." *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 542 (D.Md.2007). Under *Federal Rule of Evidence 901(b)(4)*, a piece of evidence may authenticated by evidence of "[t]he appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances." *Fed. R. Evid. 901(b)(4)*.

2 A. I do.

3 Q. And are you aware of whether Mr. Dolan was
4 aware he was listed in the Green Book as the West
5 Virginia Department of Education contact relative 15:04:30
6 to House Bill 3293?

7 A. I'm not aware if he was or not.

8 Q. And in terms of any involvement Mr. Dolan
9 had in preparing the bill summary that's listed in
10 the Green Book at page 23, as you sit here, do you 15:04:44
11 know whether he had involv- -- any involvement at
12 all?

13 A. I do not know if he did.

* * *

23 Q. So I can't even -- and I don't know
24 whether I asked you whether Mr. -- you know
25 whether Mr. Dolan ever even reviewed this bill 15:05:22
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1 summary that's in the Green Book at page 23.

2 A. I don't know that if he did.

3 Q. And I believe you testified that the State
4 Board has no official relationship with WVSSAC; is
5 that true? 15:05:48

6 A. I said the relationship was in that we --
7 the State Board approves the -- the rules for the
8 SSAC.

9 Q. And other than that, no relationship; is
10 that true? 15:05:58

11 A. Yes.

12 Q. So you would defer to WVSSAC to answer its
13 own questions relative to its internal practices
14 and how it proceeds internally; is that true?

15 A. Yes. 15:06:12

16 Q. And you're not a 30(b) witness for SSAC,
17 are you?

18 A. No, I'm not.¹⁴

Here, the only potential efficacy the Green Book could have would be to try to align WVSSAC with the legislation or the State, which Plaintiff has been unable to accomplish otherwise in discovery. Given that the 30(b) testimony falls far short of authenticating the entry and given that there is no redeeming use against which to weigh the risk of confusion, any use of Exhibit 21 at

¹⁴ ECF No. 289-19 at 129-31.

trial would be prejudicial¹⁵ and improper¹⁶ such that, finally, it is unnecessary to even introduce that complication only to try to remove it. Courts who have considered unauthenticated out of court statements, submitted for the alleged truth of the statement therein have pronounced them ‘quintessential hearsay’ and inadmissible.¹⁷ No evidence has been adduced that Mr. Dolan had any particularized or any knowledge whatsoever relative to the legislation. Indeed, no evidence has been adduced that he had any role in the decision to enact the legislation nor is there evidence that he had any input on the content or language of the legislation; indeed, Plaintiff admits that WVSSAC was dropped from draft legislation prior to passage.¹⁸ Any suggestion that Mr. Dolan would be the one knowledgeable contact person relative to HB 3293 appears nowhere else in the record beyond Exhibit 21 (the Green Book) – and even the State Board’s 30(b) witness could not confirm how or why Mr. Dolan appears there. Certainly, Mr. Dolan did not self-identify as that person – nor could or would he.

To affiliate Mr. Dolan’s name with an unauthenticated entry in a State publication and with legislation neither of which affiliation has been proven in discovery (and both of which affiliations WVSSAC has eschewed) is per se unfairly prejudicial. Further, to randomly affiliate Mr. Dolan with State, with no evidence or rationale or explanation, given all of the evidence that WVSSAC is not State is per se prejudicial. While WVSSAC could distinguish the document and make these arguments at trial, it is a bell that need not be rung in the first place. The document introduces only false evidence and unnecessary prejudice, confusion, waste of time.¹⁹ It raises only questions and problems while it answers and resolves none.

¹⁵ *Yates v. Ford Motor*, 2015 U.S. Dist. Lexis 64309, *15.

¹⁶ As an unauthenticated document would run afoul of Fed. R. Evid. 401-03 (probative value substantially outweighed by potential for unfair prejudice), 802 (hearsay).

¹⁷ *Francisco v. Verizon, Inc.*, 756 F. Supp. 2d 705, 713 (E. D. VA 2010).

¹⁸ ECF No. 64 at ¶ 49ff.

¹⁹ Fed. R. Evid. 403

For all of the reasons set forth here, WVSSAC moves this Honorable Court for an order in *limine*, prohibiting the use of Exhibit 21 the Green Book at the trial of this matter.

**WEST VIRGINIA SECONDARY SCHOOL
ACTIVITIES COMMISSION,
By Counsel.**

/S/ Roberta F. Green

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CERTIFICATE OF SERVICE

I hereby certify that I, Roberta F. Green, have this day, the 22nd day of June, 2022, served a true and exact copy of the foregoing with the Clerk of Court using the CM/ECF System, which will send notification of such filing to the following counsel of record:

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